

SECOND REGULAR SESSION

# SENATE BILL NO. 832

92ND GENERAL ASSEMBLY

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INTRODUCED BY SENATOR WHEELER.

Pre-filed December 1, 2003, and ordered printed.

TERRY L. SPIELER, Secretary.

3165S.011

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## AN ACT

To amend chapter 355, RSMo, by adding thereto twelve new sections relating to the conversion of nonprofit entities to for-profit status, with an emergency clause.

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*Be it enacted by the General Assembly of the State of Missouri, as follows:*

Section A. Chapter 355, RSMo, is amended by adding thereto twelve new sections, to be known as sections 355.900, 355.903, 355.906, 355.909, 355.912, 355.915, 355.918, 355.921, 355.924, 355.927, 355.929, and 355.930, to read as follows:

**355.900** As used in sections 355.900 to 355.930, the following words shall mean:

(1) "Acquisition":

(a) A sale, lease, transfer, merger, or joint venture that results in the disposal of the assets of a nonprofit health entity to a for-profit corporation or entity or to a mutual benefit corporation or entity when a substantial or significant portion of the assets of the nonprofit health entity are involved or will be involved in the agreement or transaction;

(b) A transfer of ownership, control, responsibility, or governance of a substantial or significant portion of the assets, operations, or business of the nonprofit health entity to any for-profit corporation or entity or to any mutual benefit corporation or entity;

(c) A public offering of stock; or

(d) A conversion to a for-profit entity;

(2) "Entity", any individual, corporation, partnership, limited

partnership, limited liability company, trust, association, or any other organization;

(3) "Health maintenance organization", shall have the meaning ascribed to it in section 354.400;

(4) "Health services corporation", shall have the meaning ascribed to it in section 354.010;

(5) "Hospital", shall have the meaning ascribed to it in section 197.020, RSMo;

(6) "Nonprofit health entity":

(a) A nonprofit hospital;

(b) A nonprofit health service plan; or

(c) A nonprofit health maintenance organization;

(7) "Public assets", include:

(a) Assets held for the benefit of the public or the community;

(b) Assets in which the public has an ownership interest; and

(c) Assets owned by a governmental entity;

(8) "Transferee", the entity in an acquisition that receives the ownership or control of the nonprofit health entity that is the subject of the acquisition;

(9) "Transferor", the nonprofit health entity that is the subject of the acquisition, or the corporation that owns the nonprofit health entity that is the subject of the acquisition.

355.903. 1. No entity shall engage in an acquisition of a nonprofit health entity without first having made application to the attorney general and, if applicable, received approval from the attorney general pursuant to sections 355.900 to 355.930, RSMo.

2. The application consisting of the documents relevant to the proposed transaction shall be submitted to the department of health and senior services and the attorney general, in the acquisition of a nonprofit hospital, or the department of insurance and the attorney general, in the acquisition of a nonprofit health services corporation or health maintenance organization, and shall include the name of the seller, the name of the purchaser or other parties to an acquisition, the terms of the proposed agreement, the sale price, the latest draft of the acquisition agreement, a financial and economic analysis and, if requested by the attorney general, a report from an independent expert

or consultant on the effect of the acquisition under the criteria set forth in section 355.912, assistance in determining the fair market value of the assets and all other documents or information relevant to the transaction requested by the attorney general. An application shall not be considered complete until all of the required information, including such additional information relating to the criteria set forth in sections 355.915 to 355.918, as may be required by the attorney general, is received by the appropriate department and the attorney general.

3. The applications and all related documents shall be considered public records for purposes of chapter 610, RSMo, except for those materials marked confidential due to proprietary or trade secret information. The exemption of such material may be made nonexempt by the attorney general if a determination is made that the public's interests in disclosure outweighs the applicant's interests in confidentiality of the materials. Such determination may be made only after the applicant receives at least fifteen days notice of the intent to disclose within which time applicant may seek appropriate remedies.

4. The failure of any entity to timely provide the information required by this section or any other information deemed relevant to the transaction by the attorney general, shall be a sufficient ground pursuant to section 355.915 for the attorney general to disapprove the proposed acquisition.

355.906. 1. Within ten working days after receiving an application, the department of health and senior services or the department of insurance, as the appropriate case may be, shall publish notice of the application in the most widely circulated newspapers that are part of a nonprofit health entity's service area and shall notify by first-class mail any person that has requested in writing notice of the filing of an application. The notice shall state that an application has been received, state the names of the parties to the agreement, describe the contents of the application, and state the date by which a person may submit written comments about the application to the attorney general.

2. Within fifteen days after receiving a completed application, the attorney general shall determine whether to review the application and shall so notify the appropriate department and the applicant of that

determination.

3. If the attorney general determines to review an application, the department of health and senior services or the department of insurance, as the appropriate case may be, shall, within thirty days of that determination, review the application in accordance with the criteria in section 355.918 and forward its review to the attorney general with a recommendation as to whether the application should be approved.

4. If the attorney general determines to review the application, the attorney general shall, within seventy-five days after that determination, review the application in accordance with the standards set forth in section 355.912 and approve, conditionally approve, or disapprove the acquisition.

5. If the attorney general determines to review an application but fails to approve, conditionally approve, or disapprove the application within the time allotted, the application shall be deemed approved.

355.909. 1. The attorney general, if he or she determines to review the acquisition, shall during the course of review pursuant to sections 355.900 to 355.930, hold at least one public hearing in which any person may file written comments and exhibits or appear and make a statement. Such hearing shall be held not later than thirty days after the attorney general receives the appropriate department's report and recommendation and shall be held on not less than ten working days' notice.

2. The attorney general may subpoena additional information or witnesses, require, and administer oaths, require sworn statements, take depositions, and use related discovery procedures for the purposes of the hearing or, for purposes of the attorney general's review pursuant to section 355.912, at any time prior to making a decision on the application.

3. The attorney general may contract with, consult, and receive advice from any state agency that the attorney general deems appropriate. The attorney general may contract with experts or consultants in reviewing the proposed agreement or transaction.

355.912. 1. If the attorney general determines to review the application for an acquisition, the attorney general shall not approve the application unless the attorney general finds that the acquisition is in the public interest.

2. An acquisition is in the public interest if appropriate steps have been taken to safeguard the value of charitable assets and ensure that any proceeds of the transaction are used for appropriate charitable health care purposes as provided in this section.

3. In determining whether the acquisition meets such criteria pursuant to sections 355.900 to 355.930, the attorney general shall consider, among other factors, the following:

(1) Whether the acquisition is permitted pursuant to this chapter and other laws of Missouri governing nonprofit entities, trusts, or charities;

(2) Whether the nonprofit health entity exercised its fiduciary responsibility in deciding to sell, selecting the purchaser, and negotiating the terms and conditions of the sale;

(3) The procedures used by the seller in making its decision, including whether appropriate expert assistance was used;

(4) Whether the conflict of interest prohibitions of section 355.924 have been followed;

(5) Whether the seller will receive reasonably fair value for its assets and the impact of any right of first refusal if included in the sale agreement on the fair value of such assets;

(6) Whether charitable funds are placed at unreasonable risk, if the acquisition is financed in part by the seller;

(7) Whether any management contract under the acquisition is for reasonable fair value;

(8) Whether the sale proceeds will be used for appropriate charitable health care purposes consistent with the seller's original purpose or for the support and promotion of health care in the affected community and whether the proceeds will be controlled as charitable funds independently of the purchaser or parties to the acquisition;

**(9) Whether the acquisition of the nonprofit health entity would result in private inurement to any person;**

**(10) Whether the acquisition has the likelihood of creating a significant adverse effect on the availability or accessibility of health care services in the affected community or nearby communities which relied upon the services provided by the nonprofit health entity;**

**(11) Whether the acquisition includes sufficient safeguards to ensure that the affected community will have continued access to affordable health care;**

**(12) Whether any foundation established to hold the proceeds of the sale will be broadly based in the community and be representative of the affected community, taking into consideration the structure and governance of such foundation;**

**(13) Whether sufficient safeguards are included to assure the affected community continued access to affordable health care;**

**(14) Whether the proposed acquisition creates or has the likelihood of creating an adverse effect on the access to or availability or cost of health care services to the community;**

**(15) Whether the acquiring entities have made a commitment, at least comparable to the nonprofit health entity, to provide health care to the disadvantaged, the uninsured, and the underinsured and to provide benefits to the affected community to promote improved health care. Activities and funding provided by the nonprofit health entity or its successor nonprofit health entity or foundation to provide such health care or to provide support or medical education and teaching programs or medical research programs shall be considered in evaluating compliance with this commitment;**

**(16) Whether the acquisition will result in the revocation of hospital privileges;**

**(17) Whether sufficient safeguards are included to maintain appropriate capacity for health science research and health care provider education; and**

**(18) Whether the proposed acquisition demonstrates that the public interest will be served considering the essential medical services**

needed to provide safe and adequate treatment, appropriate access, and balanced health care delivery to the residents.

355.915. 1. After reviewing an application pursuant to section 355.912, the attorney general may approve the acquisition as described in the application, may disapprove the acquisition or may approve the acquisition upon one or more conditions altering or supplementing the acquisition. The attorney general may not approve an acquisition unless it finds the acquisition is in the public interest.

2. The attorney general may, as a condition of approval, require such additional commitments, promises, or undertakings by any of the parties to the acquisition as the attorney general believes are reasonably necessary to meet the criteria set forth in section 355.912.

3. The attorney general shall not make his or her decision subject to any condition or commitment not reasonably related to the criteria set forth in section 355.912.

355.918. In performing its review of an acquisition and in making a recommendation to the attorney general, the department of health and senior services or the department of insurance shall consider:

(1) Whether sufficient safeguards are included to assure the affected community continued access to health care. Activities and funding provided by the seller or its successor nonprofit corporation or charitable foundation to provide such health care shall be considered in evaluating compliance with this commitment; and

(2) If health care providers will be offered the opportunity to invest or own an interest in the purchaser or an entity related to the purchaser, whether they are subject to federal statutory or regulatory restrictions on conflict of interest in patient referral.

355.921. 1. Upon completion of the acquisition, if the attorney general receives information from a department or others indicating that the acquiring entity is not fulfilling the commitment to the affected community pursuant to sections 355.900 to 355.930, or is not fulfilling a commitment made or condition required by the attorney general pursuant to section 355.915, or that an application pursuant to section 355.903 contained a material misrepresentation of fact, or that the

conflict of interest limits pursuant to section 355.924 have been violated, the attorney general may:

(1) Initiate proceedings to revoke the license issued to the purchaser;

(2) File an action in the circuit court of the county containing the seat of state government seeking any relief that may be available at law or in equity, including but not limited to, damages or specific performance of the commitment or condition that has not been fulfilled.

2. The attorney general shall have the authority to enforce any commitment, promise, or undertaking made as part of the acquisition, of nonprofit health entity assets which inures to the public interest.

355.924. 1. No person may engage in the acquisition of a nonprofit health entity if the person or any director, officer, or spouse thereof is also a director, officer, or spouse thereof of the nonprofit health entity. This restriction shall apply to all positions held within six months preceding the application for acquisition.

2. No nonprofit organization receiving the assets or other proceeds of the nonprofit health entity under an acquisition agreement may have a director, officer, or spouse thereof who is also a director, officer, or spouse thereof of the person acquiring the nonprofit health entity pursuant to sections 355.900 to 355.930. This restriction shall apply to all positions held within six months preceding the application for acquisition and three years after the acquisition.

3. An officer, director, or trustee of a nonprofit health entity may not receive any immediate or future remuneration as the result of an acquisition or proposed acquisition, except in the form of compensation paid for continued employment with the transferee.

355.927. No license to operate a nonprofit health entity may be issued or renewed by the department of health or the department of insurance pursuant to this chapter or any state statute, and a license which has been issued shall be subject to revocation or suspension, if:

(1) There is an acquisition of a nonprofit health entity without the required application pursuant to section 355.903 or without the approval of the attorney general, if the attorney general determines to review the

application pursuant to sections 355.900 to 355.930;

(2) There is an acquisition of a nonprofit health entity and the attorney general disapproves the acquisition and there is a judicial determination that the acquisition is not in the public interest;

(3) The entity acquiring the nonprofit health entity is not fulfilling its commitment to the affected community pursuant to section 355.902 or 355.918 or is not fulfilling a commitment made or a condition required by the attorney general pursuant to section 355.912;

(4) The application submitted pursuant to section 355.903 contained a material misrepresentation of fact; or

(5) The purchaser in the acquisition is in violation of the conflict of interest safeguards pursuant to section 355.924.

355.929. 1. If the attorney general approves or conditionally approves an application pursuant to section 355.915, any person with a legal interest in the nonprofit health entity being divested or in another nonprofit health entity that has contracted with the nonprofit health entity being divested for the provision of essential health services may bring an action for judicial review of that decision.

2. If the attorney general disapproves or conditionally approves an application pursuant to section 355.915, the applicant may bring an action for judicial review of the decision.

3. The sole proper venue for any action brought pursuant to this section shall be the circuit court of the county where the nonprofit health entity being divested is located. Any action for judicial review shall be conducted as an appeal of a contested administrative decision as provided by chapter 536, RSMo.

4. In any action brought pursuant to this section, the court shall affirm the decision of the attorney general unless the petitioner shows that the decision was an abuse of discretion.

5. There shall be no action to review a decision of the attorney general not to review an application pursuant to section 355.906.

355.930. 1. The provisions of sections 355.900 to 355.930 shall not apply to any acquisition of a nonprofit health entity assets for which notice was provided to the attorney general pursuant to section 355.656

on or before the effective date of sections 355.900 to 355.930.

2. No provision of sections 355.900 to 355.930 shall limit the common law or other statutory authority of the attorney general.

3. The attorney general may adopt such regulations as the attorney general deems appropriate to implement sections 355.900 to 355.930. Any rule or portion of a rule, as that term is defined in section 536.010, RSMo, that is created under the authority delegated in this section shall become effective only if it complies with and is subject to all of the provisions of chapter 536, RSMo, and, if applicable, section 536.028, RSMo. This section and chapter 536, RSMo, are nonseverable and if any of the powers vested with the general assembly pursuant to chapter 536, RSMo, to review, to delay the effective date or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after August 28, 2004, shall be invalid and void.

Section B. Because of the possible loss of nonprofit health care services in this state, section A of this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and section A of this act shall be in full force and effect upon its passage and approval.

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